

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 12, 2008

IN RE: T.M.D.Y.

**Appeal from the Juvenile Court for Hamblen County
No. 13899 Mindy Norton Seals, Judge**

No. E2007-02357-COA-R3-PT - FILED APRIL 7, 2008

The Juvenile Court terminated the parental rights of K.V. (“Mother”) to her daughter, T.M.D.Y (“the Child”). The Juvenile Court determined that the Department of Children’s Services (“DCS”) had proven by clear and convincing evidence that grounds existed to terminate Mother’s parental rights on the grounds of abandonment and persistence of conditions making it unsafe to return the Child to Mother’s care. The Juvenile Court also concluded that there was clear and convincing evidence that terminating Mother’s parental rights was in the Child’s best interest. Mother appeals claiming DCS failed to prove either of the two grounds relied upon by the Juvenile Court to terminate her parental rights. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Juvenile Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Gerald T. Eidson, Rogersville, Tennessee, for the Appellant, K.V.

Robert E. Cooper, Attorney General and Reporter, and Douglas Earl Dimond, Senior Counsel, Nashville, Tennessee, for the Appellee, State of Tennessee, Department of Children’s Services.

OPINION

Background

The record in this case begins with a Petition to Terminate Parental Rights filed by DCS on April 30, 2007. In this petition, DCS sought to terminate Mother's parental rights to the Child, who currently is nine years old. DCS claimed that the Child had been adjudicated as dependent and neglected and had been in DCS custody since July of 2005. As grounds for terminating Mother's parental rights, DCS claimed that Mother had abandoned the Child by willfully failing to pay child support within the four month period immediately preceding the filing of the petition. DCS further claimed that Mother abandoned the Child by willfully failing to provide a suitable home for the Child. According to DCS, Mother "has failed to maintain a stable home; has failed to maintain a stable income; and has failed to maintain employment for longer than a few weeks at a time." As further grounds for terminating Mother's parental rights, DCS claimed that the conditions which led to the Child's removal from Mother's custody continued to persist such that it was unsafe to return the Child to Mother's care and that it was unlikely that these conditions would be remedied in the near future. Finally, DCS claimed that it was in the Child's best interests for Mother's parental rights to be terminated.¹

The Juvenile Court appointed both an attorney to represent Mother and a Guardian ad litem to represent the best interests of the Child. Following a two-day trial, the Juvenile Court entered detailed findings of fact and conclusions of law, followed by a final judgment terminating Mother's parental rights. In the findings of fact and conclusions of law, the Juvenile Court noted that DCS initially became involved with the family when a Petition for No Contact was filed by DCS against the Child's father, G.K.Y., who was accused of sexually abusing Mother's older daughter, K.D. A few months later, Mother voluntarily consented to DCS obtaining temporary custody of the Child. Mother consented to DCS obtaining temporary custody because she "fell into using alcohol again," she had no place to live, and had lost her job. Shortly after Mother's consenting to DCS obtaining temporary custody of the Child, Mother married E.V. Mother testified that E.V. was physically and mentally abusive to her and he was "in and out of jail." E.V. was incarcerated at the time of trial.

The Juvenile Court noted that, by the time of trial, Mother had secured new housing in which she had been living for only two weeks. Mother also had been employed at a bakery for two or three months. According to the Juvenile Court²:

¹ In the petition, DCS pointed out that the Child's father, G.K.Y., then was incarcerated at the Northeast Correctional Complex in Mountain City, Tennessee, and that DCS was seeking to terminate his parental rights to the Child in a separate proceeding.

² The Juvenile Court's summary of Mother's testimony is fair and accurate. Therefore, we are setting forth Mother's pertinent trial testimony by quoting the Juvenile Court's findings.

When asked why it had taken her two years to achieve what she considered stability for herself and the return of her child, [Mother] replied that [E.V.] had not permitted her to work, that if she did work, he took her money to buy drugs and alcohol, and that he perpetrated “a lot of domestic violence on me.” She testified that during January until May, 2007, he continually abused her and even placed a knife against her throat....

Mother described her employment history as having five jobs in two years, being unemployed during April to September, 2006, having surgery during December, 2006, and not being released to return to work until sometime during January, 2007. She also had begun CNA classes during May, 2007, but had been dropped from the program because she had not always attended. She had been unemployed during March and April 2007.

Mother insisted she had a stable environment for her child from October, 2006 until February, 2007 when she lived in Straw Plains with [E.V.]. She stated that both DCS and CASA refused to visit this home.

Mother admitted she had abandoned the child, but “it was not by choice.” She reiterated, “It took me losing two homes, and [E.V.] going to jail in April, 2007 before I could get [the Child] back home.”

Mother described her housing during the two year period as living in Straw Plains [with E.V.], at Melrose Street in Morristown, with various friends, and [a] homeless shelter ... from August 2006 until October, 2006. She presently rents the downstairs from Connie Hogg, and she can use the kitchen upstairs.

When questioned about her “alcohol problem,” she stated she began using alcohol when she was twelve and that she “turned to it” whenever she was upset or depressed. She had gone to counseling for this problem approximately four times, and she could not remember the last time she had drunk alcohol.

[Mother’s older daughter] is in the custody of her father, and she also has a son who is in his father’s custody

Mother began paying child support for [her older daughter] during June, 2007 in an amount of \$170 monthly. She had paid no child support for this child, and the attorney from Family Law had not

asked that child support be set after mother told him of the pending termination proceeding. [Mother] denied she had chosen to willfully not pay child support.

[Mother] believes DCS did not assist her in obtaining housing, transportation, counseling, the drug/alcohol assessment, or parenting classes. She had completed parenting classes. All DCS told her was to obtain transportation through ETHRA and to apply for public housing.

DCS also called Steve Clevenger ("Clevenger") as a witness. Clevenger is a family service worker employed by DCS and has been assigned to the Child's case from the beginning. According to Clevenger, the Child initially came into DCS custody in June of 2005 when Mother informed DCS that she was going to lose her housing. Mother also informed DCS that she had no income and was having problems with alcohol abuse. Clevenger explained that two permanency plans were developed while the Child was in DCS custody and these two plans were ratified by the Juvenile Court.

Clevenger also discussed Mother's marriage to E.V., which took place about six months after the Child came into DCS custody. In addition to the two permanency plans developed for Mother, Clevenger developed a permanency plan for E.V. However, E.V. was not compliant with that plan which had been specifically developed so he could be around the Child. Clevenger testified that E.V. assaulted Mother on "a couple of instances." Clevenger stated that Mother has never paid any child support for the Child. Clevenger further testified as follows:

Q. Has the mother provided a suitable home?

A. Not in my opinion. She's had -- she's lived in numerous [places] since the child had been in custody. Those have been for fairly short periods of time.

And as far as being suitable and appropriate, I don't feel that they were. And the fact that [E.V.] was living in the home as well and had not been in compliance with the [permanency plan developed for him by DCS]

Q. As for housing issue[s]; the mother securing appropriate housing. What have you and the Department done to assist [Mother]?

A. Well, earlier on in the case we made -- I made recommendations that she check with public housing to obtain housing since she at the time was not working....

Q. When you made this recommendation, did you discuss the implications of it with the mother? Did you discuss the steps that she would need to take and what she needed to do to secure public housing?

A. Well, yes, in that we instructed her to go to the housing department and fill out an application. And we also asked her to get a letter of reference from her previous landlord.

Q. Was that done?

A. She told me on one occasion that he would not be able to provide a letter of recommendation unless he sent it directly to housing.

Q. Mr. Clevenger, upon the mother's recommendation – or request, did you yourself contact public housing for the mother?

A. I did.

Q. Talk to the Court about that.

A. She called me and told me that she had requested public housing. She said that I needed to call them and they were needing some information from the Department.

Q. Concerning what?

A. She didn't give me the details about what they were requesting, but I did call housing. And they requested that the Department provide documentation as to the status of the custody of her child. And I did fax the documentation to housing indicating the status of [the Child's] custody....

Q. Now, when you dealt with the mother over these years, what sense have you gotten about the mother's ability to comprehend and understand what you and the Department are requesting of her?

A. In all my contact with her, she has demonstrated that she understands what is required. She understands what we have asked. She's not indicated that she had any problem understanding.

Clevenger also testified that Mother often took too long when attempting to do what was asked of her. Clevenger noted that because Mother was an adult, DCS could not make appointments for Mother. Mother had to follow through and do these things for herself. For example, Mother was required to undergo an alcohol and drug assessment when the first permanency plan initially was developed in 2005, but she did not have that assessment done until August of 2006.

Clevenger testified that Mother was told that she needed to find some type of employment, and Mother knew the importance of this requirement. Without any income, Mother would not be able to support the Child. Clevenger stated that there were several times over the two year period while the Child was in DCS custody that Mother was not employed. These periods of unemployment would last from several weeks to several months. Mother's lack of reliable transportation was one reason for her frequent unemployment.

Clevenger also discussed the impact of Mother's marriage to E.V., who was both physically and emotionally abusive of Mother. According to Clevenger:

[The Child] doesn't need to be exposed to domestic violence....
[S]he's only eight years old.

There have been a couple of occasions where [E.V.] has assaulted the mother and was incarcerated on two different occasions on domestic assault. I feel that poses a risk to [the Child]. If he were in the home, that would pose a risk to her.

It also causes me concern because the mother is wanting to get her child back, but yet she remains in a relationship with someone who is a possible risk to the child; not only to her, but to the child.

According to Clevenger, Mother has maintained neither stable employment nor safe and stable housing. Mother understood that she needed to meet these and other requirements contained in the permanency plans before she could regain custody of the Child. Clevenger added that he had serious doubts about whether Mother ever would be able to provide safe and stable housing for the Child. Clevenger further stated that the conditions which initially led to the Child coming into DCS custody continue to persist and Mother, over the past two years, has continuously remained unable to care properly for the Child.

Clevenger testified that Mother's visitations with the Child were sporadic, averaging about once a month. Mother did not visit the Child at all in October, November, and December of 2006, and she offered no explanation for this lack of visitation.

Clevenger also discussed the Child's current situation. He explained that the Child has been with the same foster parents all along. The Child is doing well in school. All of the Child's needs are being met, including physical, emotional, and medical needs. The Child has become

attached to her foster parents. Clevenger indicated that it would be extremely disruptive to the Child to remove her from the stable environment that she now is in and place her back with Mother, a parent who has not demonstrated the ability to take care of the Child. Clevenger believed that it was in the Child's best interests for Mother's parental rights to be terminated.

On cross-examination, Clevenger admitted that he did not go out to the home where Mother was living with E.V. According to Clevenger, this home was not inspected because Mother was living with E.V. As E.V. was not complying with his permanency plan, that home was not considered a viable option as a home for the Child.

After all of the proof and argument had been presented, the Juvenile Court concluded that DCS had not proven that Mother willfully failed to pay child support, a determination that is not at issue in this appeal. However, the Juvenile Court did find that:

The second ground for removal is that of "failure to provide a suitable home." The court finds that DCS has proven this ground by clear and convincing evidence: mother voluntarily placed the child into state custody in July, 2005, she had been dating [E.V.] for one month when she placed the child into custody, [E.V.] was incarcerated on two occasions for the assault of mother, mother returned to him shortly after his release from jail in May, 2006, [E.V.] did not complete the requirements of the plan to ensure the child's safe return to mother, and mother testified [E.V.] had a severe drug and alcohol abuse problem and even took her wages to pay for his alcohol and drugs. Yet, only during August, 2007, or two years after the child's state custody placement, has mother decided to divorce [E.V.]

Mother has further failed to provide a suitable home for the child due to her erratic employment and housing. She has had several jobs during this two year period and has been unemployed a couple of times during this same period. She has failed to keep any job for any length of time. Only since June, 2007, or for two months has she had a job that she says is stable. Mother has lived "here and there" according to her testimony. She, at various times, has moved from "friend to friend" and was staying at a homeless shelter for several months. Now, she has been in the downstairs portion of someone's home for approximately three weeks. It is trite but true, mother's lack of "actions have spoken louder than her words." She has been unable to maintain any stability for any length of time, and the court believes it is unlikely she will be able to provide a suitable home for [the Child] at an early date.

The court further finds that mother was more interested in her relationship with [E.V.] than she was in providing a suitable home for the child. Mother has only in the last two months even begun to find any stability, and mother's past history does not show that this stability will last....

The third ground for which the state seeks termination is that of "persistent conditions." The statute defines this ground as the child being removed from the parent's home by court order for six months, that the conditions which led to the removal still persist, that there is little likelihood the situation will be remedied so as to permit the child to return to the parent at an early date, and the continuation of the parent and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home. TCA 36-1-113(g)(3). The findings the court has enunciated for the ground not providing a suitable home apply likewise to this ground. When the child was voluntarily placed by mother over two years ago, mother stated she was abusing alcohol, had no income and no finances to support the child. Again, the court acknowledges that mother says she is divorcing [E.V.], that she has worked since June, 2007, and that she had had her last residence for two weeks. However, this attempt at rehabilitation by mother has come much too late, and based upon mother's history of her failure to follow through with having a safe, stable, and appropriate placement for [the Child], there is little likelihood she will continue to maintain a safe, stable, and appropriate placement for [the Child], there is little likelihood she will continue to maintain a sound environment free of dependency and neglect of the child. DCS has proven this ground by clear and convincing evidence.

The Juvenile Court thereafter concluded that DCS had made reasonable efforts to assist Mother, and that there was clear and convincing evidence that termination of Mother's parental rights was in the Child's best interest.

Mother appeals raising the following issues: (1) whether the Juvenile Court erred in finding that Mother had abandoned the Child by failing to provide a suitable home for the Child for a period of four or more months following the Child's removal; and (2) whether the Juvenile Court erred in finding that there was a persistence of conditions as defined in Tenn. Code Ann. § 36-1-113(g)(3).

Discussion

Our Supreme Court recently reiterated the standard of review for cases involving termination of parental rights. According to the Supreme Court:

This Court must review findings of fact made by the trial court *de novo* upon the record “accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d). To terminate parental rights, a trial court must determine by clear and convincing evidence not only the existence of at least one of the statutory grounds for termination but also that termination is in the child's best interest. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). Upon reviewing a termination of parental rights, this Court's duty, then, is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

The first ground upon which the Juvenile Court terminated Mother's parental rights was abandonment as set forth in Tenn. Code Ann. § 36-1-113(g)(1) (Supp. 2007) and defined in Tenn. Code Ann. § 36-1-102(1)(A)(ii) (2005). The second ground was a “persistence of conditions” as set forth in Tenn. Code Ann. § 36-1-113(g)(3) (Supp. 2007). Tenn. Code Ann. §§ 36-1-113(g)(1) & (g)(3) provide as follows:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

* * *

(3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home

Tenn. Code Ann. §§ 36-1-113(g)(1) & (g)(3) (Supp. 2007).

The statutory definition of abandonment relied upon by the Juvenile Court is found at Tenn. Code Ann. § 36-1-102(1)(A)(ii) which states:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:

* * *

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date

Tenn. Code Ann. § 36-1-102(1)(A)(ii) (2005).

As to the ground of abandonment upon which the Juvenile Court terminated Mother's parental rights, Mother claims that DCS failed to establish that it provided her with reasonable assistance. We disagree. Clevenger testified as to what steps he took to assist Mother with obtaining proper housing. Clevenger informed Mother exactly who to contact in her attempt to obtain housing. Clevenger also contacted that agency when requested to do so. The record is unclear as to why Mother never obtained government assisted housing, but it is clear that the reason she did not obtain this housing had nothing to do with inaction by DCS.

Parents must take steps to prevent the permanent removal of their children in cases such as the current case. DCS is not required to do everything for the parent. DCS explained to Mother what she needed to do and who to call. DCS responded to a request for information. DCS cannot reasonably be expected to do everything for Mother. Mother has to show some initiative on her part. As to the home in which Mother and E.V. were living, DCS obviously made an attempt to make that home a "suitable home" when it developed permanency plans for both Mother and E.V. in order for them to undertake the necessary steps for the Child to return to their care. It was Mother and E.V. who thereafter failed to comply with the requirements of these plans.

Tenn. Code Ann. § 36-1-102(1)(A)(ii) requires that the child be removed from the home of the parent or guardian as a result of a petition filed in the juvenile court in which the child was found to be dependent and neglected. Mother argues this did not happen because she voluntarily consented to DCS obtaining temporary custody. While the Child originally came into DCS custody as a result of Mother's consent, this argument completely ignores the fact that in January of 2006, the Juvenile Court entered an order finding that the Child "is a dependent and neglected child and is hereby made a ward of this Court and the temporary legal custody of the minor child is awarded to [DCS]"

As we have already explained, DCS made reasonable efforts on Mother's behalf. Tenn. Code Ann. § 36-1-102(1)(A)(ii) further requires that, notwithstanding these reasonable efforts and for a period of four months following the Child's removal, DCS must prove that Mother made no reasonable effort to provide a suitable home and that she demonstrated a lack of concern for the child that it appeared unlikely that she would be able to provide a suitable home at an early date. In the two year period that the Child was in DCS custody, Mother never established a suitable home for the child. Her last minute effort to obtain such housing two weeks before trial is too little too late. We affirm the Juvenile Court's finding that there was clear and convincing evidence to terminate Mother's parental rights for abandonment pursuant to Tenn. Code Ann. § 36-1-113(g)(1) and as defined in Tenn. Code Ann. § 36-1-102(1)(A)(ii).

The next issue is whether the Juvenile Court properly found that clear and convincing evidence was presented to terminate Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3). When Mother voluntarily consented to temporarily relinquish her parental rights, she did so because of a lack of housing and income. These two conditions continued to exist from the time the Child came into DCS custody up until the petition to terminate Mother's parental rights was filed, and thereafter. Mother has offered no proof from which the Juvenile Court or this Court could

even remotely conclude that Mother would or could remedy these problems at any time in the near future. As a result, continuing the parent/child relationship would only delay the inevitable and prevent the Child from integrating into a safe and stable home as soon as possible. We affirm the Juvenile Court's finding that there was clear and convincing evidence to terminate Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3).

Although not raised as an issue by Mother, we will review whether the Juvenile Court correctly determined that there was clear and convincing evidence that termination of Mother's parental rights was in the Child's best interest. Tenn. Code Ann. § 36-1-113(i) (Supp. 2007) provides as follows:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled

substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

In the present case, after a thorough review of the applicable factors and when considering the facts set forth at length above, we readily conclude that there was clear and convincing evidence presented to the Juvenile Court that termination of Mother's parental rights was in the Child's best interests. Specifically, Mother never was able to care for the Child, provide adequate housing, or maintain a job for any length of time. During most of the time the Child was in DCS custody, Mother was married to and living with E.V., an individual who was physically abusive and had a drug and alcohol problem. Again, Mother's last minute effort to divorce E.V. is too little too late.

Conclusion

The judgment of the Juvenile Court is affirmed and this cause is remanded to the Juvenile Court for collection of the costs below. Costs on appeal are taxed to the Appellant, K.V., and her surety, if any.

D. MICHAEL SWINEY, JUDGE